IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

Nos. 489 and 490

HUDSON DISTRIBUTORS, INC.,
Appellant

v.

THE UPJOHN COMPANY,
Appellee

HUDSON DISTRIBUTORS, INC.,
Appellant

v.

ELI LILLY AND COMPANY,
Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

BRIEF AMICI CURIAE OF CORNING GLASS WORKS, THE INTERNATIONAL SILVER COMPANY, THE O. M. SCOTT & SONS COMPANY, RUBBERMAID INCORPORATED, AND WOLVERINE SHOE & TANNING CORPORATION

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INDEX

Table of Cases Cited

OTHER AUTHORITIES CITED

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I

Introduction and Interest of Amici Curiae

This brief is presented with the written consents of all parties to both of the above numbered cases under Rule 42 of the Court, which consents are filed with this brief.

It is not the purpose of this amicus brief to dwell on all of the various technical arguments which may or may not be presented to this Court in appellant's Statements of Jurisdiction since those will be expertly handled by counsel for the appellees.

This brief is presented on behalf of the above named manufacturers who are interested in the Ohio Fair Trade Act, the cause of fair trade generally and the validity of such legislation and in the belief they can present something of assistance to the Court. These manufacturers have certain things in common: (1) they are manufacturers of non-drug items; (2) they are medium or small-sized manufacturers; (3) they each produce consumer items in the low to medium price range, which items require for their sale the cooperation of thousands of independent retailers in order to attain the sales effort and wide distribution which is necessary if these manufacturers are to produce a quality product on a mass-production basis at a reasonable price; (4) none of these manufacturers are integrated forward vertically, i.e., none of them have their own retail outlets and for the most part they sell through normal channels of distribution to wholesalers who in turn sell to retailers; (5) they believe that they speak not only for themselves but for hundreds of similar small and medium-sized manufacturers who produce quality products for the consumer market at reasonable prices, and in so doing provide the backbone of competition which benefits the consumers and in a sense keep the giant manufacturers of consumer items (particularly those that are integrated vertically), "honest" in their prices; (6) they believe that in so doing they provide thou-

sands of jobs in hundreds of localities throughout this country and provide for the necessary distribution through countless retail outlets in large and small cities thereby making a vital contribution to the nation's economic life, and (7) finally, they are all manufacturers whose products, by reason of continued high quality, reasonable prices and extensive advertising are generally accepted by the public as being good products at reasonable prices.

Finally, there seems to be widespread misunderstanding as to the purpose and effect of resale price maintenance. The subject has been hotly debated for more than fifty years, the public record of this controversy, including the many Congressional hearings, being most voluminous. The amici curiae joining in this brief do so as they are deeply concerned about the lack of understanding of and appreciation for the sound socio-economic basis for the practice of fair trade. Epithets, even that of price-fixing, do not resolve controversies, and they constitute wholly inadequate analytical tools for the determination of sound and rational policy.

It is submitted that the record in these cases will show that one of the primary objects of the Ohio General Assembly in passing this legislation was to protect manufacturers, distributors and consumers alike from the ever-increasing concentration of economic power. The Legislature felt deeply that this was a socially desirable end based upon evidence which was both voluminous and relevant to the end which this legislation sought to achieve.

II

Statement

These cases both represent appeals from the Supreme Court of Ohio sustaining an opinion by the Court of Appeals for the Eighth Appellate District of Ohio upholding the constitutionality of the so-called new Ohio Fair Trade Act on the facts which were before that court. The entire history of these cases and their exact present posture before this Court is not repeated here, as it will be presented with clarity and precision by counsel for the appellees herein. This brief is presented in support of the appellee's position.

III

Questions Presented

The questions presented by these appeals come down, it is believed, to two. First, is the new Ohio Fair Trade Act (Sections 1333.27 through 1333.34 of the Ohio Revised Code), on the record of the facts in these cases violative of any provision of the United States Constitution—more particularly, the Fourteenth Amendment? Secondly, is the new Ohio Fair Trade Act, again under the facts presented by the record in these cases, within the framework of the so-called Miller-Tydings and McGuire Acts,[1] saving exemptions to the Federal Antitrust Laws? We sub-

[1] 15 U.S.C. Sec. 1, 50 Stat. 693; 15 U.S.C. Sec. 45, 66 Stat. 632.

mit that the answer to both of these questions is necessarily in the affirmative and that this appeal should be disallowed.

IV

The Ohio Constitutional Provision

Although it has not been raised directly as a question by appellant's briefs, it would perhaps be well to point out that the decision in these cases in the Supreme Court of Ohio below was by a minority of three of that court who affirmed the judgment of the Court of Appeals for Cuyahoga County, that the 1959 Ohio Fair Trade Act was constitutional. This 3-to-4 minority vote, resulting in an affirmance of a decision of constitutionality, was due to an unique provision of the Ohio Constitution contained in Article IV, Section 2, which reads in part as follows:

> "No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void."

The history and purpose behind this limitation on the power of the Ohio Supreme Court was outlined in the case of *Michaelson* v. *City of Cincinnati*, 27 O.N.P. N.S. 100, 102 (1928):

> "For a number of years prior to the adoption of the Constitution in 1912, there was a great deal of discussion and some severe criticism of the right of courts to declare acts of legislative

bodies unconstitutional and void. At one time this criticism went to the extent of advocating the recall of judicial decisions.

"The constitutional convention in 1912 by Article 4, Section 2, which section was later ratified by the people of this state, placed a check upon the power of the courts of this state to declare acts unconstitutional and void."

These objectives were stated with ever greater clarity in a Law Review article as:

"What were the objectives sought by the convention of 1912? It must be remembered that the convention met in a year when a progressive movement was at its height. Theodore Roosevelt and his followers bolted the Republican Party in that year, and Woodrow Wilson was elected President of the United States. Furthermore, in the period immediately prior to and after the meeting of the convention, workmen's compensation laws were passed by a large majority of the states, and numerous other acts regulating hours of labor and other labor conditions were being enacted. Many of these acts met with unfavorable reception in the courts, particularly in the highest courts of the states and the nation. As a result the progressives felt that the courts were out of sympathy with the wishes of the people, and that it would be necessary to reform the courts in order to put the new programs into operation. Theodore Roosevelt advocated the recall of judicial decision on constitutional questions, while William J. Bryan looked not unfavorably upon a plan to require unanimous approval

of the supreme court before a legislative act should be declared unconstitutional.

"In the Ohio Constitutional Convention there was a very pronounced opinion to the effect that the state supreme court was too far removed from the people, and, its powers, in favor, first, of the lower courts, and, second, of the legislature. * * *"[1]

This Court has passed upon the validity of this Ohio Constitutional provision under the United States Constitution. In a unanimous opinion written by Chief Justice Hughes, in *Ohio* v. *Akron Park District,* 218 U.S. 74, 50 Sup. Ct. 228 (1929), it was held that this provision violates none of the provisions of the United States Constitution, saying, *inter alia,* at page 80:

". . . The opportunity afforded to litigants in Ohio to contest all constitutional and other questions fully in the Common Pleas Court and again in the Court of Appeals plainly satisfied the requirement of the Federal Constitution in this respect and the State was free to establish the limitation in question in relation to appeals to its Supreme Court in accordance with its views of state policy."

Thus, it is evident that there is no United States constitutional question presented by this provision of the Ohio Constitution, or its role in this litigation.

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[1] Stene, Is There Minority Control of Court Decisions in Ohio, 9 U. Cin. L. Rev. 23 at 25 (1935).

V

Summary of the Argument

1. The Ohio Legislature enacted its 1959 Fair Trade Act on the basis of its extensive economic and social findings and for the purposes stated in the Act itself which included the promotion of the public welfare by recognizing the property rights in a trademark or tradename and by recognizing the interest of the small independent merchant and of the consumer against the increasing predatory practices of price discounters.

2. The Ohio Legislature, in enacting the new Ohio Fair Trade Act, recognized a property interest in a trademark or tradename and the commercial fact of life that using this property interest as a traffic builder in discount houses constitutes irreparable damage to the good will of the manufacturer developed over the years in his trademarks and tradenames.

3. The new Ohio Fair Trade Act is specifically grounded on contract principles so that no retailer is bound to its provisions unless that retailer has knowledge of the conditions on the use of a manufacturer's trademark or tradename at the time such retailer acquires a commodity desiring to use that trademark or tradename in the resale thereof.

4. The Supreme Court of the United States will not concern itself with the merits of the social and economic arguments which prompted the Ohio Legis-

lature to enact its fair trade law. It is not the function of this Court to serve as umpire for the purpose of judging the merits of the competing economic contentions, all of which were considered, evaluated, and the merits thereof determined by the state legislature.

5. All contentions that the Ohio Fair Trade Act violates the due process clause of the Fourteenth Amendment have been laid to rest in the case of *Old Dearborn Distributing Co.* v. *Seagram Distillers Corp.*, 299 U.S. 183 (1936).

6. The Ohio Fair Trade Act does not constitute unlawful price fixing inasmuch as it only permits the owner of a trademark or tradename to set the conditions on the use of that trademark or tradename and since fair trade acts are specifically exempted from the Federal Antitrust Laws by reason of the McGuire Act and the Miller-Tydings Amendment.

VI

Argument

In addressing the first of the questions presented above, one must first look at what the 103rd Ohio General Assembly actually did in enacting the so-called "new" Ohio Fair Trade Act. Why did it take the action which it took? What were the social and economic problems to which the General Assembly was addressing itself? And, was the solution that the General Assembly reached relevant to the problems to be solved and thus within the ambit of its police powers?

Fortunately, in the record of these cases, the Court has before it the transcript of all of the hearings which were conducted on this legislation before both the Senate and House Judiciary Committees of the 103rd Session of the Ohio General Assembly. Those hearings are lengthy and extensive, and reveal how seriously the Ohio Legislature studied this problem, and the extent of the economic data and facts on which it acted. In addition, in the record of these cases there are many affidavits and other material bearing upon these same economic questions which motivated the action of the Ohio Legislature. It is significant that the Ohio Legislature, after three lengthy, full-dress hearings on this matter before the Judiciary Committee of the House, and after three additional equally lengthy hearings before the Judiciary Committee of the Senate, passed this legislation overwhelmingly, and almost unanimously.

When the governor vetoed this legislation because of a disagreement on the policy behind the statute, the same Legislature, although predominantly of the same political faith as the governor, again passed the legislation. Notwithstanding the governor's veto, the second vote was nearly as overwhelming as the first. Certainly under these circumstances any court must approach a decision which would declare the General Assembly impotent in these premises with the utmost gravity, and would strike down its action only if certain beyond a doubt that there was no reasonable or rational basis or justification for the legislative actions so taken.

The issue before the Court is not whether the new Ohio Fair Trade Act is wise or unwise legislation,

or whether this Court, acting as a supra-legislature, would have enacted the law, but rather whether or not the new Act as adopted by the Ohio Legislature in 1959 after the most thorough study and consideration is violative of the United States Constitution.

A. The Economic Need That Prompted the Ohio Legislative Act.

The economic reasons which have led the state legislatures of forty-four states, the Congress of the United States, economists and businessmen to conclude that there is an economic need for fair trade legislation may be divided generally into three categories. The first relates to the benefit received by the trademark owner whose good will and proprietary interest in his trademark is protected under the law. A second set of reasons concerns the benefit to the small independent merchant whose competitive position is protected by fair trade legislation. The final category includes those economic arguments which demonstrate the benefit that the consumer and the public generally derive from fair trade legislation.

Generally speaking, all of these economic arguments are ones which the leigslatures of more than forty states have found to operate in the public interest. Overriding public interest is found in preserving a system of marketing which results in mass production, broad distribution and product development based upon consumer acceptance of merchandise identified by trademarks and tradenames. Similarly, those economic facts which demonstrate the benefit of fair trade legislation in preserving competitive opportuni-

ties for small business were thought to have an overriding public benefit based upon the legislative belief that the public welfare is assisted when the small businessman is not driven from the market place by giant discounting retailers. A further classification and discussion of the economic data and findings that underlie the enactment of fair trade legislation may help clarify the role and practical operation of such legislation.

1. *The Effect of Price Cutting on the Manufacturer's Trademark or Tradename.*

It has been frequently stated that the state-established and federally-recognized right of resale price maintenance flows from the desire of the manufacturer to protect his trademark and the goodwill associated therewith. In the case of a forwardly integrated producer, such as Sears Roebuck or A & P, or in the case of a consignment seller, or in the case of a publisher of a newspaper or periodical, a resale price maintenance structure occurs, either as a matter of unquestioned legal privilege, or as a matter of custom. In the case of other producers of popular trademarked items, the impetus to engage in a program of resale price maintenance occurs as a matter of marketing pragmatics.

Such impetus or motivation occurs when the trademark owner experiences injury at the hands of price-cutting retailers. The very existence of the trademark, and the absence of legal control over distribution practices, often give rise to a destructive, short-term exploitation of the intangibles symbolized

by the trademark. This non-consensual exploitation of the trademark—the drawing power of a well-known brand—to the overall detriment of the creator and owner thereof, and by an outsider, has been aptly described as commercial jiujitsu, where the very strength of the trademark is used to its undoing.

The effect on the manufacturer's trademark or tradename is well documented by the record in the instant case. In the Spring of 1958, Hudson Distributors, Inc., the discounter herein, opened a discount drugstore in the middle of the business section of Cleveland. It is a cut-rate operation. It emphasizes vitamin products and has capitalized particularly upon Upjohn's well-known Unicap and Zymacap (R.U. 104). (Record references hereinafter indicated—Record in the Upjohn case, No. 489, R.U. —; Record in the Eli Lilly case, No. 490, R.L. —). During the first three months of 1958, before Hudson Distributors opened its business, Upjohn's net sales (net sales means total sales less returns) of Unicap vitamin capsules in the Cleveland district were Eleven thousand two hundred dollars (R.U. 103). In the same period during 1959, after appellant commenced its business, the net sales were down to Eight thousand five hundred twenty-nine dollars, and in the same period during 1960 they approached the vanishing point of One hundred six dollars (R.U. 103).

Similar results occurred with respect to the sale of Zymacap vitamin capsules. During the first three months of 1958 the net sales of Zymacap vitamin capsules in the Cleveland district were Three thousand

seventy-three dollars. In the same period during 1959 they were reduced by almost fifty per cent to One thousand two hundred seventy-nine dollars. During the first three months of 1960 the druggists returned One hundred one dollars more of Zymacap vitamins than they purchased (R.U. 103). That this destruction of Upjohn's vitamin business in the sale of Unicaps and Zymacaps in the City of Cleveland is the direct result of the appellant's price-cutting is attested to not only by a representative of the Upjohn Company but also by local independent pharmacists who were themselves the victims of appellant's price-cutting tactics.

Pharmacist George Bruehler stated that in 1958 his total purchases of Unicap and Zymacap vitamin capsules amounted to $1,093.48, all of which were sold (R.U. 153). In 1959, he purchased $1,200.09, but had to return $723.15 for net sales of $476.94 (R.U. 153). Mr. Bruehler says his customers are always telling him how they can buy their vitamins more cheaply at Hudsons, and concludes: "There is no question but that the price-cutting carried on by this establishment is the primary, if not the sole cause of my loss of vitamin customers." (R.U. 154).

Pharmacist Philip Rudolph had a similar experience with his sales of Upjohn products, which decreased by over seventy-five per cent after the entry of the Hudson discount operation into the market. Rudolph states that he has taken a great deal of abuse from his customers, with one of them calling him a "Jesse James" (R.U. 158). The response that the pharmacist makes in this situation does irreparable

harm to the manufacturer. When Hudson began selling certain Upjohn products at drastically reduced prices he could not continue to push these products or give them the top-of-the-counter display space that he had before. In order to avoid criticism from his customers, his Upjohn products were shifted to an inconspicuous corner of his store where few customers would be likely to notice them (R.U. 158). Other Cleveland pharmacists, including Joseph Gross (R.U. 150-53), Nick Avellone (R.U. 137-39) and Fred J. Cermack (R.U. 139-41) tell the same dismal story.

Professor William R. Davidson of Ohio State University, and a joint author with Professor Theodore N. Beckman of the widely used college textbook entitled "Principles of Marketing", states the economic theory which demonstrates the damage that can be done to a proprietor's interest in a trademark or a tradename in the absence of effective fair trade legislation. Professor Davidson, whose textbook is used as the basis for advanced undergraduate and graduate courses in marketing in over two hundred universities (R.U. 110) states in the record below: (R.U. 114-16)

> "Specifically, in these situations the brand name owner is damaged in the following ways: (1) The price-cutter who accounts for a small part of total sales in the market area and provides few of the services expected of regular retail outlets, creates the false impression that his advertised low price is the value of the product at retail, thus leading customers to believe that the bulk of retail service outlets and the manufacturer through its price maintenance policy are gouging the public through unreasonably high prices;

(2) this damages the good will and value of a brand name or trade-mark which has been appropriated to the price cutter's use; (3) these price-cutting activities prevent the average complying retailer from being able to sell the product at a profit and they must therefore (a) deemphasize the product in their merchandising and promotional strategy, offering it only upon specific demand, and shift selling effort to other items which provide fair compensation for services rendered, or (b) discontinue handling the product altogether, or (c) cut prices in retaliation and an effort to compete, breaking their own agreements with the manufacturer and creating expensive and ultimately unmanageable problems of enforcement for the manufacturer seeking to maintain control of his distribution system; (4) the likely development of retaliatory [fol. 128] price wars further devalue the product in the minds of the public and create a hesitancy to make the purchase resulting from the consumer's thought that he may be able to buy the product cheaper elsewhere since he knows that it is subject to footballing and price warfare; (5) since well-established branded merchandise with professional consumer acceptance and known value is a most suitable weapon for advertised price-cutting by cut-rate organizations, this creates an animosity toward brand name products by the essential small retailer who sees in them the cause of the potential business failure he fears; (6) the price-cutter, while using Upjohn's brands as bait to attract commercial traffic, actually places its selling emphasis on other competitive

products that afford him a higher margin, thus using Upjohn's brand names established over a long period and at considerable expense to promote the sale of products other than those of Upjohn; (7) the services accompanying sale of Upjohn's products necessarily will diminish as profit margins narrow, thus eliminating such items as advice concerning product use, refrigeration, and care of product, all of which makes the product less desirable to the consumer; (8) by forcing Upjohn to take legal action to prevent price-cutting tactics and protect its distributive system, the price-cutter further damages the good will of Upjohn by the publicity surrounding the price-cutting establishment's opposition to price maintenance, thus making it a champion of the consumer and placing the manufacturer in the role of villain."

While retailers were interested in protecting themselves against the practices of the predatory price-cutter, it is also evident that manufacturers were equally alarmed at the injury done by such discounters to their systems of distribution and to their property rights in their trademarks and tradenames. Obviously, one of the very best tests of the damage done to a manufacturer's good will in his trademarks or tradenames is met by the willingness of these firms to stand the expense of extremely costly litigation to protect their rights against the tactics of the predatory price-cutter. Replying to the contention that the tradename owner's interest is not protected by fair trade laws, Professor Davidson says (R.U. 116):

"Allegations that price-cutting tactics do not

injure the manufacturer stem from a failure to understand the significance of marketing services, the injury done to a manufacturer's good will by trading on his trademarks and [fol. 129] trade name by means of price-cutting, and the damage done from disruption of the distribution system by concentrating a product's outlets away from the local independent retailer and into the large cut-rate operator. Even the standard argument that the manufacturer is compensated because the larger volume of the price-cutter ads to his total distribution is fallacious. Any such gain by additional distribution is more than likely offset by lost sales in regular outlets.

"Further, the damage to the manufacturer's good will will ultimately mark a decline in the sales by the cut-rate organization even though that organization creates an initial flurry of sales by its tactics. Thus the argument that a manufacturer is not damaged because he receives the same price for his product from the price-cutter as from the regular retailer misses the issue.

"Naturally, the manufacturer desires to maintain his prices as low as possible to compete successfully with similar product lines of other manufacturers and increase his share of the total market for his general class of products. Further, he will be slow to raise the stipulated price in the face of rising costs once the stipulated price has become widely known to physicians, pharmacists and the public. However, conceding that the manufacturer desires to keep his price as low as possible, it does not follow that it is desirable to the manufacturer to have

prices irregularly reduced by price-cutting organizations under the motives which prompt such organizations to act."

John W. Hubbell, Vice President of the Simmons Company, makers of Simmons' mattresses, related one manufacturer's personal experience with a discounter's violation of its fair trade system. He states (R.U. 120):

"For example, a large discount house in New York advertised the fact that they had Simmons 'Beautyrest' mattresses at cut prices. Many consumers told us that our merchandise was maligned in this discount house. This was no surprise because the store found it necessary to degrade our merchandise to avoid selling it. It was difficult for them to get a supply and also they had to sell it at a loss."

Along similar lines, Herman T. Van Mell, General Counsel for Sunbeam Corporation, tells at length the consequences to Sunbeam Corporation that have resulted in market areas where either (a) there has been no fair trade legislation, or (b) the enforcement of fair trade laws has been emasculated by court decision (R.U. 128-34).

The ultimate result of all these practices does not and will not increase the total volume of business done. It will only shift the business from the small and generally scrupulous merchandiser to the large and economically unscrupulous. In fact, on the items used as price footballs, the total volume of business may soon decline thereby producing a drop in the economy.

Lee Waterman, Vice President of Corning Glass Works, states the effect that price-cutting has had on his Company's products (R.U. 136):

> "We have found that the approach of the price cutter is different from that of the small independent service retailer. Our line of 'PYREX' products has been advertised extensively over a considerable period of years and is well known to consumers. The price cutting discount house takes two or three or four of our best known items and advertises them at very low prices so as to attract attention to himself. This makes the small dealer look bad in the eyes of his own customers. In effect, it is an unfair comparison and it injures the small dealer. If it continues hurting the small dealer over a period of time, our distribution system is damaged and can be destroyed."

Viewing the problem from the standpoint of the manufacturer and his trademark and distribution system and the threats of uncontrolled price-cutters to the very basis of our economic system, which the legislature did, the conclusion that the protection and promotion of the general welfare required this legislation is amply justified. These points have been discussed to some extent *supra*, and are fully covered in the affidavits in the record transmitted to this Court from the court below. One further bit of the evidence presented to the Judiciary Committee of the Ohio Senate (R.U. 315) is particularly significant. This involves the story of John J. Reidy, President of the Schick Company, relating the effect upon distribution of Schick electric razors in Ohio after the

decision in ***Union Carbide and Carbon Corp.*** **v.** ***Bargain Fair,*** **167 Ohio St. 182. As set forth commencing at R.U. 315:**

"'For Schick, Incorporated, the immediate result of these conditions in Ohio and elsewhere has been a severe decline in our business volume and profits, and a resulting decline in our emememployment.

"'How did this result, which has been detrimental to all concerned—retailers, wholesalers, consumer and manufacturer—come about? I am sure you are aware that with the weakening of Fair Trade, price cutting in our industry flourished. As it progressed, the following pattern developed in Schick's business in Ohio and was repeated throughout the country as Fair Trade diminished.

"'The barrage of cut-price advertising on electric shavers reached a crescendo that left the public confused, distrustful, unable to understand the variety of prices. More important, the consumers were hesitant to buy because they thought the price would be cheaper tomorrow.

"'Small dealers retrenched to the point where they carry electric shavers only as an accommodation—never in volume, usually hidden under the counter, seldom giving these products in-store or window display or even calling a customer's attention to them.

"'At this juncture, retail outlets were getting electric shavers at, or just over wholesale cost—either through their own wholesale subsidiaries

or by working with price distributors who sold at their delivered cost or two or three or four per cent over cost. This, naturally, put most small dealers at a disadvantage, since they were forced to pay more at wholesale than the competition around the corner was selling the electric shavers for at retail.

" 'This form of wholesale discounting spread through the entire industry and, as in retailing, it soon became unprofitable for the wholesaler who performs the full distribution function to promote and sell electric shavers.

* * * *

" 'As a result of the above, Schick's Ohio dealer organization dropped some 65 per cent. Nationally our dealer organization shrank from 35,000 to about 7,000 dealers. All of us, wholesalers, dealers and manufacturers, found ourselves trying to do business in a virtual nonprofit climate. The reckless price-cutting by opportunistic outlets, capitalized on the millions of dollars the industry has spent to develop the electric shaver business, using our brand as an attractive, loss-leader to be thrown out when it has been milked. The growth our industry had experienced under Fair Trade was reversed. Not only profits were lost, but an important franchise as well.

* * * *

" 'Schick's brand name and good will has suffered a severe set back. Under Fair Trade, the consumer bought with confidence that the pricing was realistic, and it was. Today many of our customers are unhappy because they did not get

> the low, low price out of the past twelve months' bargain basement for electric shavers. Price cutting has driven the relative value of our product down in the eyes of the consumer. This is reflected in the price he is willing to pay for an electric shaver—a price that now bears little relationship to the cost of producing and marketing that shaver.
>
> "'Once an industry's volume drops, as ours has, and the discount ads no longer pull, the discounting retailer will turn to another product. Then the long painful rebuilding job begins for the manufacturer, if he survives.'"

In the legislative hearings held prior to the enactment of the Ohio Fair Trade Act, President Herman Nolen of McKesson & Robbins, previously a professor of business organization and marketing at the College of Commerce at Ohio State University, testified to the many ways in which the lack of fair trade legislation or ineffective enforcement of fair trade legislation leads to serious damage to a manufacturer (R.U. 177-185). Numerous other officials representing manufacturers of trademarked merchandise appeared before the Ohio Legislative Committees to lay before those groups the economic need for fair trade legislation to protect the manufacturer's good will in his trademark or tradename. Without reviewing all of this testimony in detail, and without a review of the extensive economic literature and testimony in hearings before the United States Congress and the legislatures of other states, it is probably sufficient to summarize.

It is clear that, on the basis of empirical evidence, the property rights of the manufacturer in his tradename are damaged in the absence of a fair trade law. Secondly, a strong and logical explanation of this damage is advanced by economists such as Professors Davidson and Nolen. Finally, the manufacturers themselves, who are the best judges of the damage to their property rights, are convinced, on the basis of their own experience, that fair trade legislation is essential to protect their property rights in their trademarks and tradenames.

The Ohio Supreme Court recognized the validity of these arguments when it said (R.U. 421-22):

> "The continued discount selling of a trademarked product eventually cheapens it in the eyes of the purchasing public. If such product is sold at a reduced price the public will eventually get the idea that the product is cheap and turn to others, seeking higher quality merchandise. It does not occur to them that the quality is good and that the discounter is using the merchandise as a loss leader to advertise his store. This fact is well borne out by the fact that it is the owner of the trademark who urges that his merchandise be fairtraded. If discount selling did not injure his total sales, he would have no interest in the retail price. It must be remembered that the proprietor sells his goods at the same price and reaps the same unit profit no matter what price the ultimate consumer pays. Clearly, the owners of trademarks have discovered that discount selling of their products eventually cheapens them in the

eyes of the public with the ultimate effect of injuring the value of the trade-mark or trade name and reducing their total sales."

2. *The Effects of Price Cutting on the Small, Independent Merchant.*

In the opinion below, Judge Griffith commented about the threat that price-cutting creates to the continued existence of the independent merchant (R.U. 420). The effect occurs in several ways. First, price warfare among competing retailers selling a manufacturer's commodity generally results in the strongest retail organization which can afford to sell certain items at an unrealistically low profit (or perhaps even below cost) driving the small independent retailers out of the market. The most effective weapons in such price warfare are nationally advertised brand name merchandise which is readily recognizable by the consuming public when prominently displayed in the discounter's advertisements. The discounter is not concerned with the absence of a fair rate of return on these few items since his motive is to use them to build his overall business and to strengthen his competitive position against the smaller retailers. Nor is he bothered by the fact that this reduces the manufacturer's overall sales and undermines the very reason why a manufacturer has invested years of effort and thousands of dollars in building a recognized tradename associated with a commodity of value.

The overall effect of price-cutting is to drive the product out of the stores of the many and into the stores of the few.

If the discounter is successful in his program to capitalize on trademarked merchandise, he will destroy his competition and secure a larger section of the market for himself. Evils of this tendency to monopoly affect not only those thus eliminated, but the welfare of the public generally, inasmuch as in the long run monopolistic conditions do not make for lower prices. For recognition of this principle see *Standard Oil Co.* v. *United States,* 221 U.S. 1 (1910); *United States* v. *American Tobacco Co.,* 221 U.S. 106 (1910).

A second way in which fair trade legislation operates to preserve desirable small business lies in the capacity of a fair trade pricing system to make possible the offering of conveniences and services in connection with the sale of these products. These services and conveniences are the chief economic weapons used by small retailers in their struggle for survival against the discounting giants. Price-cutting of branded merchandise denies to these smaller competitors the economic ability to compete on the basis of service.

A third way in which the small businessman is damaged in the absence of effective fair trade legislation is that he may be forced to provide service on the items sold by the discounter, who is seeking only a quick profit on a fast turnover. The practice has become increasingly prevalent for a consumer to buy the branded merchandise from a discounter who sells at little or no profit to build up his business and then to seek service on this merchandise from the independent retailer. There is even a considerable prob-

lem created by the action of some consumers in trying to return and receive cash credit from the independent merchant for items purchased from the discounter (R.U. 147).

The Ohio Supreme Court recognized the validity of these arguments when it said (R.U. 420-21):

> "*Even to the most casual observer it is readily apparent that the small independent merchant is gradually being forced out of business, through the operation of the large merchandising establishments.* Even without discounting fair-trade items, these large merchants through their tremendous buying power are able by quantity buying to legitimately undersell the small merchant and to attract his trade. When, in addition to this legitimate underselling, the discounter uses fair-trade items as a come-on, selling items at cost or even at a loss to entice customers into his store, it is apparent that the small merchant will be doomed, he cannot afford to compete on this level, and his customers will go to this discounter to buy. Yet this small independent merchant is a necessary and integral part of the community. It is to him that the consumer turns for little-called-for items that the discounter does not choose to handle, and quite frequently it is to him that the customer turns for personal service not rendered by the large discount establishments. Yet, as a result of the discounting of fair-trade merchandise, so much of his trade is being drained from him that he cannot afford to continue his business. Clearly, it is to the advantage of the general public that such establishments be preserved." (Emphasis added)

3. *The Benefit to the Consumer.*

The public, including the consumers, is the direct beneficiary of the lower costs made possible by mass-production techniques, all of which are facilitated by the development of mass marketing systems, distributing trademarked products recognized by the purchasing public as items of quality. The public, including consumers, are the beneficiaries of a policy designed to preserve a large number of conveniently located and independent distributors of consumer goods.

The Ohio Legislature found that the consumer was directly benefited in certain additional ways. One purpose the discounter has in price-cutting on well-known products is to lure customers into his store where they may be induced to buy unknown, unbranded articles at an unreasonably high price. This deception practiced upon the public results in the public paying a higher margin of profit for goods of a lower quality (R.U. 117, 123, 205, 230, 231). For a typical example, see the allegations relating to the practices of this appellant contained in FTC Docket No. 8576.

Another way in which the public suffers from discounting practices is in the forfeiture of service and convenience usually obtained from the seller of merchandise (R.U. 124). Emphasis placed by competing retailers on selling the same product at a price below that of other retailers (even, if necessary, below cost) discourages the retailer from providing necessary services in connection with the sale of its products. Reference is made to the Crable Affidavit

(R.U. 148) for a concrete illustration of the truth of this principle.

The Legislature found specifically that the consumer is not harmed by a manufacturer's execution of retail price maintenance contracts conditioning the use of his trademarks as to the sale of these products. There never has been any empirical evidence to support a contention that prices are higher in states operating under effective fair trade laws than are prices in states which have no fair trade laws. In fact, the record before the Ohio Legislature contains evidence to the contrary based upon the survey of A. C. Nielsen Co. (R.U. 230-31, 321-22).

This finding that fair trade laws do not increase consumer prices (R.U. 203) is not surprising. Competition is not restrained by the Ohio Fair Trade Act among the producers of rival articles, who will seek to make their prices as competitive as possible, but only among dealers selling the same articles. The Ohio Fair Trade Act operates only in instances where the product involved is in free and open competition with other commodities of the same general class in the same market area (R.U. 201). The producer is, in effect, seeking only to avoid competing with himself. Another manufacturer is free to undersell the producer and thus give the public a large number of choices, even as to price. Thus, prices will be kept down by competition between manufacturers as well as by the tendency of consumers to refrain from buying an article if it is too expensive.

The consumer is not affected by retail price maintenance any differently than if the manufacturer sold them directly through his own chain, as is the

case with many large concerns such as A & P, Sears-Roebuck and Woolworth, etc. Actually, the Fair Trade Act does no more than put the proprietor of a trademark who does not own his distribution outlets on the same footing with forwardly integrated producers as to the vital element of resale prices (R.U. 207).

4. *Summary.*

The Legislature reviewed economic data sufficient to lead it to the conviction that by the enactment of the new Ohio Fair Trade Act it was furthering wholesome competition in preventing monopoly in the distribution of goods, aiding a marketing system that would increase gainful employment and reduce production and distribution costs, and also preserving small business from unfair competition, all for the benefit of the consumer and for the well-being of the citizens of Ohio (Sec. 1333.27 (A), Ohio Revised Code).

Ohio is not the first political subdivision whose legislative body has been motivated by these economic considerations. The legislatures of some forty-three other states, as well as the United States Congress, have reviewed similar economic data and have reached similar conclusions.

B. The Ohio Legislative Response.

In 1959 the Ohio Legislature took a hard and exacting look at the need for new fair trade legislation supplanting the old 1936 Fair Trade Act which had been invalidated by a decision of the Ohio Supreme

Court in *Union Carbide & Carbon Corp.* v. *Bargain Fair, supra.*

Thorough debate and extensive legislative hearings were held by both the Ohio House Judiciary Committee and the Ohio Senate Judiciary Committee. These hearings, as mentioned *supra,* are a part of the record in the instant case.

In the enactment of the new fair trade law, the Legislature took the care to include a purpose clause (Ohio Revised Code Sec. 1333.27) in which it spells out those findings and specific considerations which prompted the enactment of the new Fair Trade Act. This was done by the Legislature in order to avoid any mistake or misinterpretation concerning its intentions. These purposes are:

"1. To protect and preserve small business.

"2. To safeguard the good will of trademarks and trade names.

"3. To further wholesome competition and prevent monopoly in the distribution of goods.

"4. To promote the public welfare by securing wider distribution of commodities and an increase in the production thereof, thereby reducing production and distribution costs and protecting and increasing gainful employment in manufacturing, wholesaling and retailing, all for the benefit of the consumer and the well-being of the citizens of Ohio.

"5. To remove obstructions to the marketing of identified merchandise in commerce which are occasioned by unfair selling practices."

In enacting the new Ohio Fair Trade Act, the Ohio Legislature decided to shift the emphasis from the non-signer concept and to develop contractual rights and obligations between the proprietor of a trademark or tradename and the retailer desiring to use that mark in the sale of products. This concept was based upon the right to the preservation of the property interest in a trademark or tradename, and including a continuing interest in the commercial use of the trademark by all vendees. It is noteworthy, as is pointed out in more detail, *infra,* that the Ohio General Assembly in thus acting followed not only the previous action of a year or so before of the Virginia Legislature but, more importantly, adopted the specific reasoning and rationale for such legislation as had been decided by this Court in its unanimous decision in the case of *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U.S. 183 (1936). The Ohio Legislature merely made explicit in this statute those things which this Court had found implicit and wholly constitutional in the Illinois and California statutes.

1. Property Rights in Trademarks Have Historically Been Recognized by Courts and Legislatures.

In the early days of retailing in this country, goods were sold basically in bulk. The cracker barrel and the flour bin were typical marks of the ordinary retail outlet. As time went on, however, producers of goods became more and more aware of the advantage of identifying their goods by a trademark or tradename. Manufacturers realized the advantage of identifying and packaging their goods by label so

that people who had liked them the first time would be able to recognize them and buy them again. Thus many types of goods became known and accepted by the retailers' customers by virtue of the identifying trademark of the manufacturer. Inevitably some stores began to take advantage of this practice of manufacturers by cutting prices on these consumer accepted goods for the purpose of attracting trade to their stores where perhaps they could then sell the unsuspecting customer on goods of unknown origin on which the retailer could make a greater profit than it could on the cut-priced trademarked goods. The discounter was thus at an early date seeking, as he does now, to capitalize to his own advantage on the well-known reputation and good will of the trademarked item.

As these predatory practices became more prevalent, the producer of the trademarked item became aware of the effects of these practices on his distribution system. Other stores which were handling his goods complained. Sometimes they either discontinued his product or refused to give it the display space and other service elements necessary for its sale; customers were confused as to the true value of his product when it was offered at different prices in a dozen different locations. As a consequence the producer's good will was undermined, his distribution system was severely hurt and his sales for that market diminished.

A manufacturer whose identified products have a compartively low per-unit price, but general public acceptance, must have a widespread distribution sys-

tem so that the product is easily available to would-be consumers in a wide variety of outlets. If it is "footballed" in price as a customer "come-on" by a few large discounters using it as a "traffic-builder", the great number of smaller neighborhood retailers who do not have the space or the capital to stock a wide variety of other merchandise wherein they can "make up on the banana what they lose on the orange" cannot afford to handle, and certainly cannot promote such manufacturer's trademarked product at the prices of the discounter without giving all of their profit away. Consequently, faced with the dilemma of either being embarrassed with their customers by seemingly offering products at too high a price or selling such products at no profit or perhaps a loss, these smaller retailers either refuse to handle that manufacturer's trademarked product at all or at least hide it under the counter and sell it only upon specific demand rather than displaying and promoting it as they did when they were able to obtain their normal markup on it. The manufacturer's wide distribution system is thus destroyed and he is faced with the anomaly of selling less of his products because of the shrinkage in the number of his outlets, despite the fact that a few large discount houses are temporarily selling his product at a very low price. Eventually, when the public image of this product as worth a certain established price is destroyed by these tactics, the product loses its appeal to the discounter as a "traffic-builder", but in the meantime the tendency of such activity is to drive the small neighborhood retailer out of business and to undermine the good will which the manufacturer has established in his trademarked product. The ultimate result is in-

evitably monopolistic, in that it tends to concentrate retailing into the hands of a numerically small group of giant retailers. This has already happened to a large extent in the food retailing business. (Whether these economically evil results are, from the standpoint of the public welfare, counter-balanced by the fact that, in theory and for a short period, the public gets lower prices in a limited number of outlets on certain trademarked goods is a question which has been answered in the negative by the Ohio General Assembly. For further amplification and support of these points as they were developed before the respective committees of the Legislature, see the Record for the transcript of those hearings.)

To prevent these things from happening and to save his good will, the manufacturer insisted in various ways that his resale price be maintained and entered into contracts with his distributors, the purpose of which was to require that such resale prices be maintained. With these contracts—known as resale price maintenance contracts—there was no objection at common law and they were repeatedly held to be valid under the common law. *Garst* v. *Harris*, 177 Mass. 72, 58 N.E. 174 (1900); *Garst* v. *Charles*, 187 Mass. 144, 72 N.E. 839 (1905); *Gragan* v. *Chafee*, 156 Cal. 611, 105 P. 745 (1909); *Commonwealth* v. *Grinstead*, 111 Ky. 203, 63 S.W. 427 (1901); *Walsh* v. *Dwight*, 40 App. Div. 513, 58 N.Y.S. 91 (1898). The English rule was the same. *Elliman, Sons & Co.* v. *Carrington & Son*, 2 Ch. Div. 275 (1901). See generally Callman, *Unfair Competition and Trademarks*, 2d Ed. (1950), Sec. 22.2.

The Ohio Fair Trade Act, while recognizing the existence of property rights in a trademark, does not actually create any new property rights. The Act merely recognizes these rights as a commercial fact of life, and creates statutory protection to the unfair infringement thereof.

Property rights in a tradename developed through advertising, promotion and good will have been recognized independently of and far before the existence of fair trade legislation. As noted by this Court in *Mishawaka R. & W. Mfg. Co.* v. *S. S. Kresge Co.*, 316 U.S. 203, 205 (1942):

> "The protection of trademarks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. A trademark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same—to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is attained, the trade-mark owner has something of value. If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress."

The fact that a trademark is intangible property does not detract from the principle that it is none-

theless property. As Mr. Justice Holmes said in *Beech-Nut Packing Company* v. *P. Lorillard Company*, 273 U.S. 629, 632 (1927):

> ". . . In a qualified sense the mark is property, protected and alienable, although as with other property its outline is shown only by the law of torts, of which the rights is a prophetic summary."

Further, a trademark owner retains his property rights in the mark even though he sells the goods to which the mark is attached. This Court noted in *Bourjois* v. *Katzel*, 260 U.S. 689, 692 (1923):

> "Ownership of the goods does not carry the right to sell them with a specific mark."

The Court went on to state the nature of the property rights in a trademark and said:

> "It deals with a delicate matter that may be of great value but that easily is destroyed and therefore should be protected with corresponding care."

The Ohio Legislature simply recognized what had been held by this Court in *Trade-Mark Cases*, 100 U.S. 82, 93 (1879)—that the protection of trademarks is a matter of state legislative concern, and stated:

> ". . . the property in trade-marks and the right to their exclusive use rest on the laws of the States, and, like the great body of the rights of person and of property, depend on them for security and protection . . ."

Action by the Legislature and the courts to safeguard the property rights in a trademark or tradename against unfair infringement as well as against imitation is sound public policy. As stated in *McLean v. Fleming,* 96 U.S. 245, 252 (1877):

> "Everywhere courts of justice proceed upon the ground that a party has a valuable interest in the good-will of his trade, and in the labels or trademark which he adopts to enlarge and perpetuate it. Hence it is held that he, as proprietor, is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same, by using his labels and trade-mark without his consent and authority."

The foregoing principles are not unique to federal law. For example, in *Henry Furnace Co.* v. *Kappelman,* 91 Ohio App. 451, 458-59 (1952), the Court of appeals of Cuyahoga County said:

> "While courts in the early unfair competition cases enjoined a defendant who was passing off his goods as those of plaintiff, the Ohio case referred to, and other soundly based decisions, have enjoined acts of a defendant confusing or tending to deceive the public, *as well as acts indicating an effort to obtain a 'free ride' based on plaintiff's investment in his business and reputation.*" [Emphasis supplied.]

Thus, the Ohio Legislature acted on the basis of the economic evidence presented to it and in recognition of the fact that the economic problems resulted from the abuse and misuse of trademarks and tradenames in the sale of commodities. In this concept, the Legis-

lature found support in the long history recognizing the right of the property interest in a trademark or tradename to protection.

The Ohio General Assembly was far from the first legislative body to act in recognition of these economic arguments and on the basis of the property rights in a trademark or tradename. The McGuire Act and Miller-Tydings Amendment which grant the state legislatures the permission to enact fair trade legislation were themselves adopted as a result of the very same economic arguments and in recognition of the same property rights. Significantly, neither the Miller-Tydings Amendment nor the McGuire Act has ever been successfully attacked on constitutional grounds.

2. Contractual principles are used to establish the rights and obligations under the new Ohio Fair Trade Act between the trademark owner and the retailer.

In essence, the new Ohio Fair Trade Act provides that where trademarked products are in free and open competition with other commodities produced for sale at retail, the owner of the trademark or brand name applied to such commodities may condition the use of such trademark or brand name. To do this the trademark owner first "establishes" his fair trade prices by contract. In the instant case each of the manufacturers "established" their fair trade prices in Ohio by formal written contract. Once prices have been so established, the trademark owner may require any retailer who desires to obtain and sell such commodities at retail with the use of that trademark or

brand name to sell said products for at least the minimum prices established by the owner of the trademark or brand name. The retailer is *not* required to utilize a trademark owner's brand or name if he objects to such condition. In addition, no retailer can be bound by the provisions of the Ohio Fair Trade Act unless he has had notice of the conditions on the use of a given brand or name at the time he acquires the commodities. The Legislature has expressed an intention that the Fair Trade Act will have no operative effect unless the merchandise in question is in free and open competition with other commodities of the same class.

It is clear that, even under the Supreme Court's holding in the *Bargain Fair* case, *supra,* a written contract between manufacturer and retailer designed to establish minimum resale prices for a manufacturer's trademarked commodities is valid. The Legislature has now provided that where a trademark owner has first established his fair trade prices by formal contract, further contracts may arise between the trademark owner and other retailers, once notice is given to such other retailers. These subsequent "implied in law" contracts arise when the retailer, with notice, thereafter decides to acquire such trademarked goods and to employ the trademark in the sale of the commodities. The Legislature recognized nothing unusual or novel to the law in the establishment of a contract arising out of the acts between certain parties (in this case the manufacturer and the retailer).

If a person owns a piece of property, for example, a candy bar, he may enter into an agreement with an-

other person to sell that candy bar for five cents. A binding contract arises and the purchaser is obligated to pay the seller five cents. The seller may also place a sign on his candy bar saying, "For Sale—5 Cents". If another person then comes along, reads the notice, takes and eats the candy bar, he is equally obligated to pay the seller five cents. This result follows even if the candy-eater says to himself while enjoying the candy, "I intend to pay only three cents". The principle is the same whether the property interest transferred is a candy bar, a house, an exclusive franchise or license, or a trademark or tradename.

However, out of an abundance of caution, the Legislature went further. The discounter was given additional safeguards which ordinarily do not appear in a contractual relationship. The Legislature provided that a retailer might escape from the contract if he later regretted his bargain, even though he had decided to acquire a commodity having a given brand name with full knowledge of the conditions on the use of that brand name. To accomplish such rescission, the retailer can sell the commodity back to the manufacturer at the invoice price. In addition, the Legislature has provided that if the retailer decides not to take advantage of the manufacturer's tradename to assist him in reselling the goods, he may sell the commodity *qua commodity* at any price he chooses. In the candy bar analogy, the purchaser does not have these privileges.

The problem which really has faced the courts and legislatures has been to determine the proper allocation of competing property rights and interests under

the fair trade acts. Both the interest of the manufacturer in his trademark or tradename and the interest in the commodity itself must be considered.

The Legislature, in adopting the new Ohio Fair Trade Act along contractual lines, and the court in recognizing the validity of this concept have done nothing more than "make explicit what was suggested by this Court in *Old Dearborn Distributing Co.* v. *Seagram Distillers Corporation,* 299 U.S. 183 (1936). In the *Old Dearborn* case, Mr. Justice Sutherland stated at pages 193, 194:

> "Appellants here acquired the commodity in question with full knowledge of the then-existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restrictions. *Appellants were not obliged to buy; and their voluntary acquisition of the property with such knowledge carried* with it, upon every principle of fair dealing, assent to the protective restriction, with consequent liability under § 2 of the law by which such acquisition was conditioned. Cf. *Provident Institution* v. *Jersy City,* 113 U.S. 506, 514-515; *Vreeland* v. *O'Neil,* 36 N.J. Eq. 399, 402; same case on appeal, 37 N.J. Eq. 574, 577.
>
> "We find *nothing in this situation to justify the contention that there is an unlawful delegation of power to private persons* to control the disposition of the property of others, such as was condemned in *Eubank* v. *Richmond,* 226 U.S. 137, 143; *Seattle Trust Co.* v. *Roberge,* 278 U.S. 116, 121-122; and *Carter* v. *Carter Coal Co.,* 298 U.S.

238, 311. In those cases the property affected had been acquired without any preexisting restriction in respect of its use or disposition. The imposition of the restriction *in invitum* was authorized after complete and unrestricted ownership had vested in the persons affected. Here, the restriction, already imposed with the knowledge of appellants, ran with the acquisition and conditioned it." [Emphasis supplied.]

Thus, this Court in *Old Dearborn* utilized ordinary contract principles to validate the Illinois Fair Trade Act against constitutional attack even though no specific contract between the retailer and the trademark owner was presented in the *Old Dearborn* case, and even though the Illinois Fair Trade Act did not work out the rights and obligations between the trademark owner and the so-called non-signing retailer on the basis of contract principles. The contractual relationship implied from the facts and before this Court in *Old Dearborn* is expressly set forth by the Ohio Legislature in the new Ohio Fair Trade Act. Further, the admitted facts disclosed by the record in this case contain every element found significant by this Court in *Old Dearborn*.

C. The Legal Recognition of the Economic Need for Fair Trade Legislation.

Legal recognition of the validity of the economic arguments in support of fair trade, and more importantly of the principle that the weighing of these arguments is a matter for the legislative bodies, is evidenced by numerous opinions of this Court and of state supreme courts. Notwithstanding that it is

twenty-eight years old, this Court's opinion in the *Old Dearborn* case, *supra,* stands to this day as the most comprehensive and penetrating examination of the legal basis for fair trade laws.

Surely the appellant in these cases will not suggest that this Court's approach to the economic question in the *Old Dearborn* case is open to dispute. This Court said at pages 195-196:

> "There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business of the producer and distributor of identified goods, but injurious to the general public as well. The evidence to that effect is voluminous; but it would serve no useful purpose to review the evidence or to enlarge further upon the subject. True, there is evidence, opinion and argument to the contrary; but it does not concern us to determine where the weight lies. We need say no more than that the question may be regarded as fairly open to differences of opinion. The legislation here in question proceeds upon the former and not the latter view; and the legislative determination in that respect, in the circumstances here disclosed, is conclusive so far as this court is concerned. Where the question of what the facts establish is a fairly-debatable one, we accept and carry into effect the opinion of the legislature. *Radice* v. *New York,* 264 U. S. 292, 294; *Zahn* v. *Board of Public Works,* 274 U.S. 325, 328, and cases cited."

The Ohio Supreme Court below took a similar view (R.U. 422):

> "When the general welfare of the small merchant is considered together with the necessity of protecting the goodwill and value attached to a trademark, it was clearly within the legislative power to enact such protective legislation, and the court will not substitute its judgment in this [fol. 483] instance for that of the General Assembly. . . ."

The decision of the Ohio Eighth Circuit Court of Appeals in the instant case, which was affirmed by the Supreme Court of Ohio, also contains a good summary of the conflicting economic ends which the Legislature had to weigh in deciding whether or not to enact a fair trade law. The Ohio Court of Appeals held (R.U. 400):

> "Without attempting to set out in detail the arguments for or against 'fair trade' laws, which now would serve no useful purpose, it might be well just to mention that those against 'fair trade' legislation argue that the public is entitled to the benefit of the economies enjoyed by savings in purchasing goods at lower prices from cut-rate establishments, while, on the other hand, the proponents assert that the need to save the local small merchant, who not only sells merchandise in competition with all others but also renders service, is absolutely essential in many cases to the health and welfare of the community. It is claimed that price-cutting survives on the desire of the public to purchase known brands, this desire having been created by the manufacturer's

sales efforts on the consumer level. In other words, the price-cutter capitalizes on the goodwill of the manufacturer. The claim that fixing retail prices by the manufacturer under the Fair Trade Acts deprives the consumer of the benefits of competition is met by the claim that his goods must be sold in competition with other goods of the same class [fol. 458] under Fair Trade Acts, which fact assures the public of all reasonable benefits of competition. However, as just stated, this is a question of fact for legislative determination."

Even before the advent of fair trade legislation, Justice Oliver Wendell Holmes of this Court recognized the economic evil of price-cutting when he said, in his dissenting opinion in *Dr. Miles Medical Company* v. *John D. Parks & Sons Co.*, 220 U.S. 373, 412:

> ". . . I think that we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article (here it is only distribution), as fixing a fair price. What really fixes that is the competition of the conflicting desires. . . . As soon as the price of something that we want goes [fol. 444] above the point at which we are willing to give up other things to have that, we cease to buy it and buy something else. . . . The Dr. Miles Medical Company knows better than we do what will enable it to do the best business. We must assume its retail price to be reasonable, for it is so alleged and the case is here on demurrer; so I see nothing to warrant my assuming that the public will not be served best by the company being

> allowed to carry out its plan. I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get."

The dispute with respect to the economic wisdom and social justification for fair trade legislation is still a matter of controversy. Professor Davidson, of Ohio State University, offers the following opinion (R.U. 118):

> "Although there is a recognized controversy in economic theory as to the effects and social desirability of fair trade legislation, there are sound economic arguments in favor of such legislation, depending upon the social aims which the legislature is most desirous of furthering."

However, this Court and the Ohio court below have taken the position that questions of economic wisdom and social desirability are not matters addressed to the United States Constitution and that the United States Constitution does not require or permit the courts to determine these questions. As Mr. Justice White said in the recently decided case *Ungar* v. *Sarafite*, — U.S. —, 32 LW 4276 at 4281 (1964). "But because something is arguable does not make it unconstitutional." This conclusion is hardly assailable.

D. The Attempt to Attack State Fair Trade Laws as a Violation of the Fourteenth Amendment.

In considering the appellant's shotgun attack on the Ohio Fair Trade Act, it is well to remember the cautionary note struck by Mr. Justice Sutherland when he embarked upon consideration of the same arguments in the *Old Dearborn* case, *supra.* He said, at pages 190-191:

> "It is not without significance that while the proposed legislation was vigorously assailed in other respects, we do not find that any constitutional objection was urged. And the decisions of this court, far from suggesting any constitutional infirmity in such proposed legislation, contain implications to the contrary."

In fact, this Court went even further in the *Old Dearborn* opinion and forthrightly acknowledged the fact that by its own prior opinions it had invited legislation to deal with the economic and social problems that the state fair trade laws seek to solve. This Court said at page 191:

> "While these observations of this court cannot, of course, be regarded as decisive of the question, they plainly imply that the court at the time foresaw no valid constitutional objection to such legislation, for it cannot be supposed that the court would suggest a legislative remedy the validity of which might seem open to doubt."

Each of the arguments actually made by the appellant herein to the Supreme Court of Ohio were

made in the same, identical fashion to this Court in the *Old Dearborn* case. In both instances, a prime effort was made to convince the Court that the fair trade law involved a delegation of legislative authority, violation of the due process and of the stated police power.

(a) Delegation of Authority.

The short answer to the argument that the imposition of such restriction involves a delegation of legislative authority is made by this Court in *Old Dearborn* at pages 193-194, quoted here in full at pages 42 and 43, *supra.*

Upon analysis of the provisions of the Ohio Fair Trade Act and the facts of the case presently before this Court, there is simply no reason to alter the analysis or disposition made by this Court in the *Old Dearborn* case. Even a cursory examination of the facts of this case as against the Ohio law reveals that the reasoning of the Court in *Old Dearborn* is equally applicable to the instant case. In this case, it was not only proved that the appellant acquired the appellee's trademarked commodity with notice of the condition upon its use, but this fact was judicially admitted by the appellant in its pleadings. In its second amended petition, appellant states (R.U. 9):

> "Plaintiff has acquired the commodities bearing the defendant's trade names, trade marks and brand names after receiving notice of defendant's established minimum resale prices. Following receipt of such notice the plaintiff has sold, offered for sale and advertised for sale these com-

modities produced by defendant at prices lower than the minimum resale prices provided in such notice."

Thus, by its own pleading, appellant brings itself squarely within the fact pattern before this Court in *Old Dearborn*.

In considering the facts of this case and the new law, Judge Griffith of the Ohio Supreme Court noted (R.U. 418):

"It must be remembered that there is no compulsion on a retailer to handle the trade-marked goods. Since the act applies only to goods which are in free and open competition with goods of the same nature, he may select other goods for sale. If he selects the fair-trade goods, it is his voluntary act, and he must abide by the conditions imposed thereon by the proprietor. The fact that he may not like the conditions is inconsequential. Most of us are forced by circumstances to enter into contracts where we do not like the conditions imposed on us, yet if we voluntarily accept the merchandise we must abide by the conditions attached thereto. For example, in purchasing a home, there are in most instances restrictive covenants as to use. We may not like such conditions, but if we accept the contract we must abide thereby. Liking or not liking the conditions of acquiring property has no effect on the validity of the contract. If the retailer chooses to accept the goods, he is bound by the conditions imposed thereon, in this instance, the fair trade price."

Judge Griffith went on to cite as direct authority for this proposition the court's reasoning from the *Old Dearborn* case. The logic and validity of these observations is equally as pertinent now as it was in 1936. This is emphasized by the fact that the appellant, with the benefit of these intervening years to construct and improve its argument, still makes the very same contentions that were made to this Court by the discounter in 1936.

(b) Abuse of the Police Power in Violation of Appellant's Rights Without Due Process of Law.

The further alleged constitutional question of whether the Fair Trade Act falls within the ambit of the state's police power or constitutes a violation of the due process clause of the Fourteenth Amendment is also adequately disposed of in *Old Dearborn* The prime answer to these arguments lies in the fact that there is sufficient economic and social justification for fair trade legislation to make the need for these laws a matter of legislative rather than judicial decision. This point has already been fully discussed in this brief. Secondly, because of the contract-principle approach adopted in the Ohio Fair Trade Act, ~~it is clear~~ that no retailer's rights are affected in any respect whatsoever unless he enters into the use of trademarks or tradenames in selling merchandise with full knowledge of the condition on such usage. So that the retailer is completely protected, it is a requirement that the notice of the condition on the use of a trademark or tradename must be furnished to the retailer prior to the time that the retailer acquires the commodity which he expects to sell with the aid of the mark.

Finally, the restrictive provisions of the Ohio Fair Trade Act are limited to the use of the trademark itself. Thus, as noted by this Court in *Old Dearborn* at page 195:

> "The ownership of the good will, we repeat, remains unchanged, notwithstanding the commodity has been parted with. Section 2 of the act does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury. It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the good will, and constitutes what the statute denominates 'unfair competition'. See *Liberty Warehouse Co.* v. *Burley Tobacco Growers Assn.* 276 U.S. 71, 91-92, 96-97. There is nothing in the act to preclude the purchaser from removing the mark or brand from the commodity—thus separating the physical property of another—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to that end."

The Ohio Supreme Court below came to an identical conclusion with respect to the contentions that the law violates due process or exceeds the state's police power when it held (R.U. 416):

> "In this the opponents of this legislation fail to take into consideration that all ownership of property and the incidents relating thereto arise

only as a matter of law. *Inasmuch as all ownership of property arises only by law, the law may also impose such reasonable conditions and incidents of ownership as are necessary to protect not only the owner but the public in general, i.e., such conditions as are necessary for the general welfare.* Many such conditions are imposed by law. For example, land may be conveyed only by following the procedure prescribed by statutes, motor vehicles may be transferred only by certificate of title and it is only because the law so provides that property may be transmitted by will. It is fundamental that property may be used only so long as its use does not interfere with the public welfare." [Emphasis supplied.]

Accordingly, none of the appellant's efforts to invalidate the Ohio Act as a violation of the Fourteenth Amendment carry any greater weight today than they did when addressed to this Court in the *Old Dearborn* case.

E. Some Courts Have Superimposed Their Own Legislative Judgment in Evaluating the Wisdom of Fair Trade Legislation.

While it is clear that this Court in the *Old Dearborn* case staked out an approach which would leave to the various state legislatures the question of weighing the economic arguments and determining the wisdom in the regulation of state fair trade legislation, a number of state supreme courts have refused to follow the lead suggested by this Court. No useful purpose would be served by an exhaustive examination of each and every opinion by a state supreme court

in construction of the validity of the fair trade laws of its state. Certain observations, however, may be helpful.

It should first be noted that those states which have validated their own fair trade laws are primarily the states having the greatest commercial concentration generally recognized as having courts more attuned to the needs of a bristling market place and the public welfare of all. Included among the states which have validated their working fair trade laws are New York, Massachusetts, California, Illinois, Delaware, Connecticut, New Jersey, Maryland, North Carolina, Virginia and Wisconsin. (See chart of state fair trade laws, Vol. 2, CCH Trade Regulation Reporter, para. 6041.)

The decisions in the states which have invalidated their fair trade laws consist of cases where the state supreme court simply does not approve of the fair trade law and thus arrogates to itself the legislative power to strike it down. For example, in *Sterling Drug Co., Inc.* v. *Eckerd's of Tampa, Inc.*, 71 So. 2d 156, the Florida Supreme Court pointed out:

> "This court has expressed its views on fair trade and similar acts and has consistently and unequivocally rejected, on constitutional grounds, both the underlying theory and the economic fads on which they are sought to be predicated."

Similarly, the Georgia Supreme Court, in *Cox* v. *General Electric Co.*, 211 Ga. 286, 85 S.E.2d 514, expressed its view:

> ". . . We are convinced that any findings of fact

in conflict with what has been held in this opinion would be an attempt by the General Assembly to find a fact that does not exist, and of course, no court is bound by that sort of finding of fact by a legislative body. Of course, a manufacturer has a property right in his trade mark and trade name, but that does not give to him the right and power to strike down the Constitution of this State and interfere with the freedom of the right to contract."

The Supreme Court of Oregon, in striking down the Oregon Fair Trade Law in *General Electric Co.* v. *Wahle*, 296 P. 2d, 635, said:

"Viewed from a realistic standpoint, it is difficult to find any justification for the Fair Trade Act based upon considerations of the public health, safety, morals and welfare. We can see no real and substantial connection between the nebulous theory that fixed minimum resale prices are necessary to protect the good will of the trademark owner and the welfare of the public."

The Oregon court made its own analysis of what the legislature's real purpose was in enacting its fair trade act. It said:

"This is a suit in equity, and equity always regards the substance rather than the form. In substance, what is the real purporse of the Fair Trade Act? Regardless of how its true nature may be camouflaged by high-sounding terms such as 'free and open competition', 'unfair competition', 'protection of good will', etc. it is a matter of common knowledge that it is a price-fixing statute

> designed principally to destroy competition at the retail level. Protection of the 'good will' of the trademark owner is simply an excuse and not a reason for the law."

The decision under the old Fair Trade Act by the Ohio Supreme Court in *Union Carbide & Carbon Corp.* v. *Bargain Fair, Inc., supra,* and by the dissenting opinion of the Ohio Supreme Court in the instant case, fell into the same mold (R.U. 424). The latter opinion labels the new Ohio Fair Trade Act as an attempt to arbitrarily bind nonsigners to price fixing contracts by artificial and unauthorized legislative fiat. The entire opinion consists of fourteen lines and concludes that the reasons for the holding are the same as those which were expressed in holding the fair trade act unconstitutional in the *Union Carbide & Carbon Corp.* case.

Examination of the *Union Carbide* case reveals no elaboration on the reason for holding the Ohio Fair Trade Act unconstitutional. The court therein simply stated that a majority of its members reached the conclusion that Section 133.07 of the Revised Code "is unreasonable and unenforceable and constitutes an unauthorized exercise of the police power in that there is no substantial relation to the public safety, morals or general welfare." The court went on to state at 167 Ohio St. 186:

> "Moreover, it contravenes the 'due process' provision of the Ohio Bill of Rights by arbitrarily and monopolistically denying a seller, who has not entered into any price-fixing contract with the manufacturer, the privilege of disposing of his

> own property on terms of his own choosing, and in addition delegates legislative power and discretion to private persons."

Neither the Ohio court nor the other courts that have relied on these same constitutional objections have stated in what way the law delegates *legislative* authority or in what way the law violates either the due process clause or police power limitations. Attempts to create reasoning for the latter two contentions have led the courts into the clearest sort of political fact finding.

In direct contrast to the above cases, compare the views of this court in *Ferguson* v. *Skrupa*, 372 U.S. 726 at 730-31 (1963):

> "The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns,* and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned . . . with the wisdom, need, or appropriateness of the legislation.' [citation omitted] Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth

Amendment was intended to secure.' [citation omitted] It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.' [citation omitted]"

F. Fair Trade Is Not Unlawful Price-Fixing.

Those supreme courts which have invalidated their state fair trade legislation, some law review writers and virtually all lawyers in their briefs in opposition to fair trade laws, have characterized fair trade acts as "price fixing legislation." Similarly, this label is hung upon the fair trade law with the idea that by magic this creates a constitutional objection to the law. While it is true that in antitrust cases the term "price fixing" has gained an unfavorable connotation, a statute must be judged on its own provisions and what it accomplishes rather than by label. It must be remembered that price fixing is in itself no constitutional violation, but is made a violation of the law by reason of the enactment of state and federal antitrust laws by the United States Congress and state legislatures. With respect to fair trade laws, the United States Congress has specifically exempted these enactments from the federal antitrust laws. Obviously both the McGuire Act and the Miller-Tydings Amendment are themselves a part of the federal antitrust laws.

Accordingly, fair trade opponents do not come close to demonstrating constitutional defect in any state fair trade act merely by decrying it as price fixing legislation.

Further, an examination of the provisions of the Ohio law, as well as other state fair trade acts, reveals that this legislation comes nowhere near fixing the price of commodities by legislative fiat as suggested by fair trade opponents.

In the first instance, the act can only take effect with respect to commodities which are in free and open competition. If this condition does not exist there is no statutory fair trade remedy.

Secondly, the Ohio Fair Trade Act simply permits the owner of a trademark or tradename to establish the price or condition upon which his own property (i.e., the trademark or tradename) may be used by another. While it may be said that the manufacturer does set the price or condition on the use of his own trademark or tradename (which the retailer is free to take or leave as he chooses), this is not any different than the situation which exists when Macy's sets the price of an electric sweeper which its customers are free to buy if they wish. It is perhaps literally correct to say that Macy's is "price-fixing" its sweepers when it charges $39.95 for them. Surely no one would suggest, however, that so describing the transaction makes it unconstitutional, nor would anyone suggest constitutional questions in the enactment of legislation that would permit retailers to set or fix the price of the commodities they sell.

Judge Griffith, in the opinion of the Ohio court below, goes to the very heart of the argument by label advanced by discounters who feel that they have established constitutional invalidity of fair trade legislation merely by branding it as a "price fixing" law. He states (R.U. 423):

> "In the first place, this is not price fixing as commonly understood in the law. Here we have the producer of a commodity, which is in free and open competition with other goods of the same nature, fixing the price only of his own commodity; and not a fixing of prices for all the commodities in the same field. Here if a producer fixes his prices too high, the consumer will turn to other producers for his needs.
>
> "Second, this is not legislative price fixing but price maintenance contracts between the producer and retailer, and the fact that such a contract may in some instances be implied does not affect the validity of the act. We have already found that such contracts are valid. Thus, this contention is not well founded."

Naturally, it is the prerogative of any person or group whose business interests are not served by a particular piece of legislation to attack such legislation on constitutional grounds. It is the counter responsibility of the courts, however, to find substance to these constitutional attacks before striking down the legislation. Real substance is not found where the court merely disagrees with the wisdom of the enactment of legislation or where the court simply states that the law is unconstitutional on this or that

ground without any reason, or where an epithet is directed to the legislation in question.

G. The Ohio Fair Trade Act Is Within the Ambit of the McGuire Act

One of the major points relied upon by appellant is that the Ohio Fair Trade Act of 1959 is not exempted from the operation of the Federal Antitrust Laws by the federal enabling acts, Miller-Tydings and McGuire. In the light of the specific provisions of the Ohio Fair Trade Act, as compared to the specific provisions of the McGuire Act, this argument is wholly without merit. A mere reading of the McGuire Act makes it clear that the Ohio Fair Trade Act as applied to the facts of this case is clearly within the literal terms of the McGuire Act.

However, it should be also noted that this argument, as advanced by appellant, involves a logical dilemma as it tends to "prove too much". For to the extent that the "contracts" under the Ohio Act are not within the ambit of McGuire, to that same extent they are also outside the scope of the Sherman Act. In effect appellant urges the Court to engage in inconsistent constructions of the same statutory language in the same case, and hold that what the Ohio Fair Trade Act authorizes are not contracts for McGuire Act purposes but are contracts for Sherman Act purposes. Logic and intellectual integrity do not permit such a construction.

Conclusion

Fair trade legislation in this country has had a long and turbulent history. It has been the purpose of this brief to lay before the Court the economic and social nature of the problem which the Ohio Legislature sought to solve in the enactment of its 1959 Fair Trade Act.

The evidence in this record shows beyond all doubt that the Ohio Legislature felt compelled to move against the practices of the retail discounter who capitalizes upon a manufacturer's trademark or tradename in order to establish a competitive strangle hold in the retail market over smaller and usually independent merchants whose chief assets are service to the public and convenience to the consumer.

The Ohio Legislature was convinced that the capitalization on the proprietary interest in a trademark or tradename was a chief weapon in the discounter's arsenal. As a matter of law, there can be no dispute that the proprietor of a trademark or tradename does possess property rights in the mark or name itself and that these property rights continue to exist even though the commodity with which the mark is usually associated falls into the hands of other parties. In enacting the 1959 Fair Trade Act, however, the Ohio Legislature took pains to safeguard the rights of the discounter as well as to protect the small merchant, the consumer and the proprietor of a trademark or tradename. This the Legislature did by spelling out in terms of a contract the rights and obligations of both the manufacturer and the retailer in the use of the manufacturer's trademark or tradename and the

sale of commodities bearing such names. The law is so drawn that no obligation falls upon the retailer unless a relationship with the manufacturer's trademark or tradename is from the very beginning grounded upon a full appreciation by the retailer of the conditions and obligations he assumes when he decides to make use of the manufacturer's trademark or tradename in the sale of commodities.

In the 1959 enactment, the Ohio Legislature took advantage of the experience of some 44 other states in the enactment of their state fair trade laws and drew a statute based upon contractual principles and carrying safeguards and refinements not provided in the other state laws. The provisions of the new Ohio Fair Trade Act also introduce into the law the detailed requirements set forth by this Court in the *Old Dearborn* case, *supra*. What was implied by this Court from the Illinois statute in order to reach the conclusion this Court did in *Old Dearborn* is specifically set forth in the Ohio Act.

While the appellant sought to intrigue this Court with a Jurisdictional Statement inviting attention to a number of interesting federal questions, an examination of the briefs in chief filed by counsel for both appellees demonstrates that upon close analysis there is no substance to any of the matters which appellant used to pique this Court's interest. Once the residue of the appellant's scattered arguments is swept away the instant cases come down to a basic determination of whether there is any reason advanced for altering the thinking and ruling of this Court in *Old Dearborn*. Appellant has advanced no argument that is persuasive toward achieving this result. If anything,

this Court itself has over the years made even more plain its position that it will not enter into a sterile discussion of the wisdom, need or appropriateness of state legislation. Nor is this Court inclined to substitute its social and economic beliefs for the judgment of state legislative bodies.

Accordingly, where the Ohio Legislature has acted on the basis of voluminous economic evidence and in accordance with the legal principles developed through the years regarding property rights in a trademark or a tradename and where the Ohio Legislature has adopted contract concepts to protect the respective interests of all parties concerned, it becomes apparent that the opinion of the Supreme Court of Ohio below correctly recognized that the new Ohio Fair Trade Act was entirely free from constitutional infirmity.

Respectfully submitted

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